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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the human rights and sanctity of each human life.

The Catholic League possesses a firm commitment to the preservation of all the principles embodied in the First Amendment to the U.S. Constitution. As a result of the dangers which the Catholic League believes an adverse judgment in this case would pose to these fundamental rights, the League has sought to file this brief amicus curiae in support of the petitioners in this action.

STATEMENT OF THE CASE AND ISSUES PRESENTED

Amicus curiae, the Catholic League for Religious and Civil Rights, adopts and incorporates by reference both the statement of the case and of issues presented which appear in the brief of the petitioners.

SUMMARY OF ARGUMENT

Many of the difficulties in the decision of the court of appeals in this matter stem from its reliance upon confusing legal precedent and, most particularly, the Second Circuit's ruling in *Brandon v. Board of Education*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). The *Brandon* ruling is irretrievably flawed in two significant respects. First, the *Brandon* court misinterpreted the scope and extent of the free speech rights of high school students by failing to find the existence of a limited public forum. Second, the court misinterpreted the distinction between accommodation and advancement of religion in ruling that permitting a group of high school students to voluntarily gather prior to the school day's commencement to offer a prayer violated the Establishment Clause of the First Amendment. Given the confusion *Brandon* has subsequently imposed on the field of equal access, particularly evidenced by the case currently before this Court, the reasoning underlying the *Brandon* decision should be repudiated and the ruling of the court of appeals should be reversed.

ARGUMENT

THE SECOND CIRCUIT'S RULING IN *BRANDON* DIRECTLY CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE FREE SPEECH AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The United States Court of Appeals for the Third Circuit, in issuing its recent ruling in *Bender v. Williamsport Area School District*, 741 F.2d 538 (3rd Cir. 1984), emphasized, "We are therefore left with no definitive guidance from the Court as to

the proper direction to take in this unique circumstance." *Id.* at 557. The court accurately assessed the desperate need of the lower courts in this area for guidance from this Court. The need for guidance however, concerns not the proper balancing of the Free Speech and Establishment Clause interests of which the Third Circuit spoke, but concerns rather the proper method of analyzing alleged Establishment Clause violations in equal access cases.

The numerous conflicting rulings in these areas illustrate the vital need for such a determination. *Compare Nartowicz v. Clayton County School District,* 736 F.2d 646 (11th Cir. 1984), *with Lubbock Civil Liberties Union v. Lubbock Independent School District,* 669 F.2d 1038, *reh'g denied,* 680 F.2d 424 (5th Cir. 1982), *cert. denied,* 459 U.S. 1155 (1983); *Johnson v. Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied,* 437 U.S. 887 (1977). Much of the confusion which presently pervades this area was initiated by the ruling of the United States Court of Appeals for the Second Circuit, in *Brandon v. Board of Education,* 635 F.2d 971 (2nd Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981). Indeed, the *Brandon* ruling has extensively affected most of the subsequent cases in this area. Though not controlling precedent outside of its circuit, its impact in this area has been substantial. In fact, it was often cited by the Third Circuit in *Bender* as support for that court's ultimate Establishment Clause ruling. Given the constitutional infirmities present in the *Brandon* ruling, amicus curiae respectfully requests that the Court now overrule it.

In *Brandon,* a group of high school students, organized as "Students for Voluntary Prayer," requested permission to meet in a classroom for group prayer immediately before the school day commenced. The group noted that it was only seeking the same access to school facilities which other student groups already enjoyed, and that its activities would be both voluntary and not in conflict with other school functions. When both the principal and the school district denied their request, the students brought suit for declaratory, injunctive and monetary relief. They alleged that the denial of access violated their first amendment rights.

The District Court granted the school district's motion for summary judgment. On appeal, the Second Circuit affirmed that

decision, holding that the refusal did not violate the students' rights to free speech, freedom to exercise their religion, freedom of association, or equal protection. In addition the court concluded that such prayer meetings were prohibited by the Establishment Clause. The students' certiorari petition to this Court was subsequently denied. *Brandon v. Board of Education*, 454 U.S. 1123 (1981).

A. *Brandon* Misinterprets The Free Speech Rights Of High School Students.

Brandon's ruling on the Establishment Clause issue there presented has had far greater persuasive impact than its Free Speech determination. In fact, this Court's ruling in *Widmar v. Vincent*, 454 U.S. 263 (1981), only a week prior to the denial of certiorari in *Brandon*, served implicitly to reverse the *Brandon* court's determination on the Free Speech issue. Nevertheless, this Court should now clarify the law by explicitly acknowledging and overruling, in light of *Widmar*, the errors the Second Circuit made regarding free speech rights.

In *Widmar*, the Court upheld the right of students at the University of Missouri-Kansas City to gain access to university-owned facilities in order to meet for prayer, Bible study and worship. This Court held that the university's content-based restriction on the use of its facilities infringed the students' right to free speech. Moreover, no compelling state interest justified this infringement. Since the free speech rights upheld in *Widmar* also apply in the high school context, the Second Circuit's constitutional interpretation in *Brandon* cannot stand.

It is true that local school boards are afforded broad discretion in the management of their schools' affairs. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). However, while " 'Boards of Education . . . have . . . important, delicate, and highly discretionary functions . . . they may not [exceed] . . . the limits of the Bill of Rights.' " *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)). As the Court emphasized in *Tinker v. Des Moines Independent Com-*

munity School District, 393 U.S. 503 (1969), students do not "shed their rights to freedom of speech or expression at the school house gate. . . . They are possessed of fundamental rights which the state must respect . . . [and] . . . in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 506, 511. The court in *Brandon*, therefore, incorrectly interpreted the extent of students' First Amendment right to free speech.

1. Religious speech receives the same level of constitutional protection as any other form of speech.

First, when the court in *Brandon* analyzed the students' free speech claim, it erroneously stated that religious speech, including prayer, was not to be accorded the same constitutional protection as other types of speech. *Brandon*, 635 F.2d at 980. Yet, such a distinction was specifically rejected in *Widmar*. This Court noted that the attempt to relegate religious speech to secondary status lacked any "intelligible content." *Widmar*, 454 U.S. at 269 n.6.

2. By opening its facilities to use by all student groups, the high school in *Brandon* created a limited public forum.

Second, and further developing this view that religious speech possesses diminished constitutional value, the *Brandon* court concluded that a high school was not a public forum where religious views could be aired.

It is true that a high school does not meet the traditional test for public forums. "The primary factor in determining whether property . . . is a public forum is how the locale is used." *International Society for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d 155, 160 (3rd Cir. 1982). Thus, places traditionally or normally reserved for public assembly, debate, and so forth, are considered public forums. *See, e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939). Since high schools are not normally dedicated to such activities, they would not meet the traditional test for a public forum.

However, public property can be classified as a "limited" public forum. A limited public forum arises when the state decides to allow the property to be used for expressive activity. Thus, in *Widmar,* for example, this Court stated that "through its policy of accommodating . . . meetings, the University . . . created a forum generally open for use by student groups." 454 U.S. at 267. The Court acknowledged that the government would be permitted to impose restrictions on the use of the limited public forum so long as they were necessitated by the purpose for which the forum was created. *Id.* at 267. Thus, with respect to limited public forums created in a school setting, the government could permissibly restrict access to the forum from individuals "outside" the school.

Yet, the Court emphatically warned that:

> [I]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id. at 269-70. *See also Carey v. Brown,* 447 U.S. 455, 461, 464-65 (1980). Further, the Court noted that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68.

By opening its facilities to use by all student groups, the school in *Brandon* created a similar, "limited" public forum. To read *Widmar* narrowly for the proposition that only universities, and not high schools, may become limited public forums, is to completely misconceive this doctrine. On the contrary, this Court noted in *Tinker* that a public high school "is peculiarly the 'marketplace of ideas,' " *Tinker,* 393 U.S. at 512, though the high school setting does possess "special characteristics" which have to be taken into account. *Id.* at 506. Thus, given the proper circumstances, a high school may become a limited public forum. *Ac-*

cord International Society for Krishna Consciousness v. New Jersey Sports and Exposition Authority, 691 F.2d 155, 160 (3rd Cir. 1982) ("Since the exchange of ideas is an essential part of the educational process . . . a public high school is probably a limited forum").

In its ruling in *Bender v. Williamsport Area School District*, 563 F. Supp. 697 (M.D. Pa. 1983), the district court enumerated those "special circumstances" which would prevent a high school from qualifying as a limited public forum. *Bender*, 563 F. Supp. at 706-07 (restriction warranted to ensure order, to observe time or space limitations, or to maintain the forum as purely an extension of the school's curriculum). However, none of these were evident in *Brandon*. The school district at no time claimed that a voluntary prayer meeting prior to commencement of the school day would result in order or discipline problems. Nor did the school district or principal ever contend that there were an excessive number of requests from other student groups for such meetings. The record is likewise devoid of any claim that other groups could only meet as an extension of the school's curriculum. Consequently, since none of these special circumstances existed, and since other groups covering a wide range of interests were permitted to meet prior to the school day, it is clear that the school had created a limited public forum for its students' use. The *Brandon* court's failure so to rule therefore clearly contravenes prior rulings of the Supreme Court on this question. Thus, this Court should now rectify this error by overruling the *Brandon* court's holding on this issue.

Finally, it should be noted that any constitutional content-based restriction on the use of a limited public forum must be narrowly drawn and necessary to serve a compelling state interest. *Widmar*, 454 U.S. at 270. The record in *Brandon* is silent on the existence of any such compelling state interest. Nor does the factual scenario present in *Brandon* even suggest the existence of such an interest. Accordingly, no justification can be found for the court's ultimate holding respecting free speech in the *Brandon* case.

B. Prohibiting Students From Voluntarily Gathering In School-Owned Facilities Prior To Commencement Of The School Day To Engage In Group Prayer Traverses The Historical Goals Of Neutrality And Accommodation Rooted Within The Establishment Clause.

The Third Circuit's ruling in *Bender* encountered many of the same problems as previous lower court decisions which attempted to resolve Establishment Clause issues in light of the Second Circuit's ruling in *Brandon*. The court in *Bender* arrived at the issue in a different manner than the *Brandon* court. *Bender* properly avoided the clearly flawed free speech analysis of the *Brandon* decision and concluded that the denial of access for the student group (Petros) would infringe upon the students' constitutional right of free speech and could only be justified by the existence of a compelling state interest, *Bender*, 741 F.2d at 550, such as the avoidance of an Establishment Clause violation. The *Brandon* court, on the other hand, only addressed the Establishment Clause issue as a result of a potential Free Exercise contention (which the court subsequently rejected). However, though reaching the issue through different avenues, both of these judicial bodies used similar reasoning to arrive at an identical conclusion—that permitting these school groups to meet would violate the Establishment Clause and that such a violation outweighed the students' Free Exercise (*Brandon*) or Free Speech (*Bender*) rights. Regrettably, both of these rulings are in complete disharmony with the historical purpose behind the Establishment Clause.

1. The *Brandon* court properly concluded that a policy of permitting students to gather in school-owned facilities possesses a secular purpose.

A tripartite test exists for Establishment Clause adjudication, whether it be merely a guideline, *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361-1362 (1984) or necessary measure of constitutionality, *id.* at 1372 n.2 (Brennan, J., dissenting): "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster an excessive gove.n-

ment entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). If any one of the prongs of the *Lemon* test is not met, then the policy may be held to violate the Establishment Clause.

The *Brandon* court did correctly apply the first prong of this tripartite analysis. The judge noted that this prong requires an inquiry as to whether the policy which permitted the activity to take place had a secular purpose. *Brandon*, 635 F.2d at 978. The court had no difficulty concluding that an equal access policy for all student groups reflected a secular purpose. The mere fact that a religious group wished to take advantage of this policy did not give rise to an impermissible nonsecular goal. *Brandon*, 635 F.2d at 978. *See also Widmar*, 454 U.S. at 271-72 n.10. Accordingly, the court held that the equal access policy possessed the requisite secular legislative purpose. *Brandon*, 635 F.2d at 978.

2. The *Brandon* court's determination that the primary effect of a content-neutral equal access policy is the advancement of religion reflects an inaccurate and inconsistent view of the judicial treatment of high school students.

The *Brandon* court stated that because an impressionable student might believe the state was sponsoring a particular religious creed, an equal access policy was "too dangerous to permit." *Brandon*, 635 F.2d at 978. In reaching this conclusion, the *Brandon* court is in complete disharmony with the reasoning of this Court in *Widmar*. *Widmar* stated that the effect of according religious groups equal access to a limited public forum would be a constitutionally justified accommodation of religion, and not an impermissible advancement of such beliefs. *Widmar*, 454 U.S. at 273. Two factors assisted the Court in arriving at this conclusion:

> First, an open forum . . . does not confer any imprimatur of State approval on religious sects or practices[;] . . . such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of [other groups]" eligible to use its facilities.
>
> Second, the forum is available to a broad class of nonreligious as well as religious speakers; . . . [t]he provision of

> benefits to so broad a spectrum is an important index of secular effect.

Id. at 274 (citations omitted).

Both of these factors were present in *Brandon*. First, allowing a student group to gather on state-owned facilities no more conferred an imprimatur of state approval of religion than would allowing the newspaper staff to meet in the same facilities represent official approval of that which was printed in the school's student newspaper. Second, the limited public forum was available to a broad range of nonreligious school organizations. (While the number of such groups was significantly less than the nearly 100 groups which existed in *Widmar*, when one takes into account the enrollment difference between the two schools, the two become proportionally similar.)

There is a clear distinction between advancement and accommodation, a distinction which escaped the judges in *Brandon*. Regrettably, lacking the guidance of *Widmar*, the court in *Brandon* mistakenly relied on the precedents of *School District v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962). Yet, the obvious factual differences which exist between these cases and the scenario present in *Brandon* graphically display the inappropriateness of their use. Failing to grasp these distinctions, the *Brandon* court came to the inaccurate conclusion that advancement results not only from compulsory action, as was the case in *Schempp* and *Engel*—where objecting students had no choice but to refrain conspicuously from participating in official religious activity—but also from purely voluntary action undertaken completely apart from the other students, which was the situation facing the *Brandon* court. Such a broad rule was certainly not intended by this Court when it proscribed conduct which had the "*primary*" effect of "*advancing*" religion.

Moreover, the *Brandon* court's incomprehensible assessment of the maturity level and intellectual capacity of these high school students further evidences that court's inability to recognize the distinction which exists between advancement and accommodation. While *Widmar's* statement, that college-aged students were in a position to appreciate that an equal access policy did not

imply state approval of the participating groups' activities, does not literally encompass the high school setting, at no time did the *Widmar* Court determine that the requisite level of maturity and intellect was restricted to college students. Indeed, such a restriction defies common knowledge and common sense.

Undeniably, high school students are not yet adults. Yet, this fact alone does not necessitate a determination that they are helpless individuals, dependent totally upon others to decide for them the important questions which face society. Moreover, judicial treatment of high school students defies such a determination. The author of *Brandon*, Judge Kaufman, certainly could not be of this impression. In deciding that tenth grade students possessed sufficient maturity such that a teacher's refusal to lead a flag salute would not have a destructive effect on them, Judge Kaufman emphasized:

> We do well to note that her pupils were not fresh out of their cradles . . . [They were] students ranging in ages between 14 and 16 years . . . [who] at this stage of development are approaching an age when they form their own judgments. *They readily perceive the existence of conflicts in the world around them*[;] . . . [n]or is this knowledge to be dreaded. As we said in *James*: *"Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue."*

Russo v. Central School District No. 1, 469 F.2d 623, 633 (2nd Cir. 1972) (citation omitted) (emphasis added).

Other jurisdictions have also described high school students as "surprisingly sophisticated, intelligent, and discerning . . . far from easy prey for even the most forcefully expressed, cogent, and persuasive words." *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976). And in *James v. Board of Education*, 461 F.2d 566 (2nd Cir. 1971), it was emphasized that "the court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the latter grades of secondary schools[;] . . . [h]igh school students . . . are at an age approaching both adulthood and franchise." *James*, 461 F.2d at 574. Additionally, empirical evidence supports the judicial no-

tice of the high level of intellectual maturity possessed by high school students. *See* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983).

It is precisely because of this recognized level of maturity present in today's high school student that a federal district court decided that high school students could handle reading information about contraception and abortion in their school newspaper. *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2nd Cir. 1975). In fact, this very Court has even concluded that high school students are viewed with sufficient intellectual capacity to be permitted to wear armbands in protest against the Vietnam War, *see Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and to refuse to salute or pledge allegiance to the flag, *see West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). It is inherently inconsistent to hold that high school students are mature enough to handle the political, social and moral issues facing society today, but lack sufficient insight to distinguish a government-run event from a purely student-initiated activity.

Moreover, if high school students possess such a high degree of impressionability, then logic would dictate that these same individuals will interpret the school's content-based restriction in an otherwise open forum as a manifestation of government hostility toward religion. How can "impressionable" students be unable to determine whether the state is implying, tacitly or otherwise, an endorsement of religion, but nevertheless remain *mature* enough to realize that the state's policy is not rooted in hostility towards religion? The Establishment Clause prohibits both government endorsement and disapproval of religion. *Lynch*, 104 S. Ct. at 1368 (O'Connor, J., concurring); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Lemon*, 403 U.S. at 612. The State *must* be neutral in this area. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 782 (1973). As was properly pointed out by the dissent in *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 680 F.2d 424 (5th Cir. 1982): "We should not forget, however, that the young student may also be given the impression that our government and the court and the schools are

hostile to all religious beliefs and practice. I would consider that a very great wrong to the children, to the Constitution, and the nation." *Id.* at 426 (Reavley, J., dissenting) (emphasis added). *See also Bender,* 741 F.2d at 565 (Adams, J., dissenting). Indeed such a hostile impression may already have been implanted in the minds of some of our youth. *See Hearings on S. 425, S. 815 & S. 1059 Before the Senate Committee on the Judiciary,* 98th Cong., 1st Sess. (1983) (statement of Bonnie Bailey, student of Monterey High School, Lubbock, Texas) ("The impression of many students is that the school administration or the school board or the courts, or all of them, are hostile toward religion[;] . . . [and that the government] is against religion").

Yet the court in *Brandon* was deafeningly silent on this point. This silence clearly reflects the court's inability to reconcile the inherent inconsistency between an overscrupulous avoidance of religion and the maintenance of neutrality toward religion. Such inconsistency certainly was never envisioned by our constitutional forefathers when they drafted and enacted the cherished rights which the First Amendment comprises. Indeed, the erroneous analysis which the court in *Brandon* applied to this area precluded the court from assessing potential alternatives which might alleviate their "imprimatur" fears. For example, if the court had been committed to a *neutral* policy in this area, it could have ordered that a disclaimer be posted on the door of the room in which the student group was meeting. Such a sign would provide notice to any student present that the State neither supported nor opposed the views of the religious group which was meeting. The Establishment Clause recognizes "room for play in the joints productive of a benevolent neutrality . . . permit[ting] religious exercise to exist without interference," *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970).

3. The *Brandon* court's finding of an excessive entanglement between religion and government is incompatible with prior and subsequent Supreme Court precedent.

Brandon's ruling that permitting a religious student group to meet would foster an excessive entanglement between religion

and the State also lacks precedential support. The court concluded that since school officials would be required to supervise the meetings in order to ensure that they were voluntary and orderly, this would yield an excessive entanglement and was therefore constitutionally impermissible. *Brandon,* 635 F.2d at 979.

This conclusion is improper. Such minimal supervision would involve no more of an "entanglement" than that which occurs when the State provides police or fire protection to a church. This Court has determined that such protections do not violate the Establishment Clause. *See Roemer v. Board of Public Works,* 426 U.S. 736, 747 (1976); *Everson v. Board of Education,* 330 U.S. 1, 17 (1947). Nor have lower courts felt that providing policemen for a religious rally held in a public park or the celebration of a Mass at a mall result in an excessive entanglement. *See O'Hair v. Andrus,* 613 F.2d 931 (D.C. Cir. 1979).

Moreover, in *Widmar* this Court stated that it would be more of an entanglement to require school officials to monitor the content of each group's meetings (in order to enforce the exclusion of religious speech) than it would be to passively permit such speech. The Court stated:

> [T]he University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." . . . Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove *"an impossible task in an age where many and various beliefs meet the constitutional definition of religion."* . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 271 n.11 (citations omitted) (emphasis added).

Thus, it is clear that *Brandon's* remarks in this area are completely incompatible with the jurisprudence of excessive entanglement.

This review of the three prongs of the tripartite Establishment Clause test set forth by this Court demonstrates the absence of

any violation in the *Brandon* fact pattern. Accordingly, the alleged violation of the Establishment Clause in *Brandon* clearly could not have provided the necessary compelling state interest required to justify the content-based restriction on the students' rights to free speech. Since the students' free speech rights were restricted, and since the school district offered no other constitutionally acceptable justification for this restriction of rights, the *Brandon* conclusion is irretrievably flawed, directly contradicts the First Amendment to the U.S. Constitution, and requires disapproval.

CONCLUSION

When inconsistency and misinterpretation pervade an area of constitutional law, this Court fulfills its function most nobly by taking the measures necessary to ensure the citizenry's continued enjoyment of their fundamental freedoms. The particular area presently before this Court has been fraught with confusion since the Second Circuit issued its ruling in *Brandon v. Board of Education*. Often this confusion has resulted in the deprivation of the fundamental rights of those to whom we eagerly look for tomorrow's leadership: our high school youth. This confusion has recently been compounded with the passage in Congress of The Equal Access Act, 98 Stat. 98-1302 (1984). Despite the clear constitutionality of that Act, many believe it to be unconstitutional and refuse to adhere to its teachings. *See* Appendix To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit In The Case Of *Bender v. Williamsport*, Appendix D, letter of October 10, 1984 from Nathan Stuart, Esq. to Gerald Seevers, Esq., p. 111a. In so doing, these individuals continue to transgress the rights of a substantial portion of our populace. It is essential that this Court take the necessary measures to vouchsafe the free speech rights of our high school students. Such measures entail the disapproval of the Second Circuit's holding in *Brandon* and reversal of the Third Circuit's holding in *Bender*, so indebted to the flawed ruling of *Brandon*. It is only through such a ruling that the importance which all

speech, including religious speech, carries in our republican society will be clearly established for all to see, hear and respect.

Respectfully submitted,

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